

Below is a memorandum opinion of the Court.



U.S. Bankruptcy Judge Marc Barreca

(Dated as of date Entered on Docket date above)

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

IN RE:

MICHAEL R. MASTRO,

Debtor.

CASE NO. 09-16841-MLB (CH. 7)

JAMES F. RIGBY, JR., Trustee, solely in
his capacity as Chapter 7 trustee of the
bankruptcy estate of Michael R. Mastro,

Plaintiff,

v.

ADVERSARY NO. 09-01439-MLB

**MEMORANDUM OPINION
DENYING INCLUSION OF
ATTORNEYS' FEES IN JUDGMENT
AGAINST DORSSERS**

**MICHAEL R. MASTRO and LINDA A.
MASTRO,** and their marital community;
**MICHAEL K. MASTRO and JANE DOE
MASTRO,** and their marital community;
LCY, LLC, a Delaware limited liability
corporation; **LCY, LLC-SERIES HOME;
LCY, LLC-SERIES JEWELRY; LCY,
LLC-SERIES AUTOMOBILES; THE
LCY TRUST; COMPASS TRUST
CORPORATION,** a purported Belizean
entity; **COMPASS S.A.; MASTRO
REVOCABLE LIVING TRUST;
MASTRO IRREVOCABLE TRUST;
CONCEPT DORSSERS,** a purported
Monaco company; **HENDRIK J.
DORSSERS;** and **AVATAR INCOME
FUND I LLC,** a Delaware limited liability
company,

Defendants.

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2 This matter came before the Court on the Trustee's Motion for Entry of Judgments (the
3 "Entry Motion") against, among others, Concept Dorssers and Hendrik J. Dorssers (together
4 "Dorssers"). See Dkt. No. 786.¹ Dorssers objected to entry of the Trustee's proposed judgment
5 on three alleged bases: (1) the Amended Complaint does not include a request for attorneys'
6 fees in its prayer for relief, (2) there is no basis in law for an award of attorneys' fees, and (3)
7 Dorssers was not given notice that recovery of attorneys' fees and costs was a potential litigation
8 outcome. See Dkt. No. 800. The Trustee countered that: (1) the request for attorneys' fees was
9 clearly set forth in the Pretrial Order,² (2) Dorssers requested attorneys' fees in his Answer
10 pursuant to the February Note and Medina Deed of Trust³ on which he was seeking to recover –
11 which provided for attorneys' fees, and (3) pursuant to RCW 4.84.330, a unilateral attorneys'
12 fees provision must be applied reciprocally.⁴ See Dkt. No. 810. Dorssers filed a surreply,
13 arguing that RCW 4.84.330 does not apply if the parties did not intend to form a contract. See
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16 ¹ All docket references herein are made to the adversary case *Rigby v. Mastro*, 09-01439-MLB
(Bankr. W.D. Wash. filed Sept. 29, 2009), unless otherwise stated.

17 ² The Pretrial Order Provides that,

18 Trustee will pursue the following claims for relief at trial:
19 Concept Dorssers and Hendrik J. Dorssers. Concept Dorssers and
20 Hendrik J. Dorssers ("Dorssers") are liable for costs and attorneys'
21 fees pursuant to the terms of the purported note and deed of trust
22 that is the basis for Dorssers' claim against the Trustee. . . . This
order has been approved by the parties as evidenced by the
signatures of their counsel. This order shall control the subsequent
course of the action unless modified by a subsequent order.

23 See Pretrial Order, Dkt. No. 430, pp. 7, 41-42.

24 ³ The "February Note" and "Medina Deed of Trust" are defined in the Memorandum Opinion
Following Trial. See Dkt. No. 824.

25 ⁴ Pursuant to RCW 4.84.330, "[i]n any action on a contract or lease entered into after September
26 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which
27 are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the
28 parties, the prevailing party, whether he or she is the party specified in the contract or lease or
not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary
disbursements."

1 Dkt. No. 811. At the hearing on the Entry Motion on November 4, 2011, the Court took the
2 attorneys' fees issue under advisement.

3 Background

4 In this adversary proceeding against Dorssers the Trustee asserted both federal and state
5 fraudulent transfer claims, and objected to Dorssers' efforts to collect on the February Note and
6 Medina Deed of Trust pursuant to his claim filed in the main case.⁵ As set forth in the Pretrial
7 Order, the Trustee alleged,

8 The \$12 million note and deed of trust to Concept Dorssers were a
9 sham. They are not enforceable and do not create any valid lien
10 against the Medina residence or any other property of the Mastro
11 bankruptcy estate. The \$12 million note and deed of trust to
12 Concept Dorssers also are avoidable by the Trustee as a fraudulent
13 transfer under 11 U.S.C. §548, and 11 U.S.C. §544 and RCW
14 19.40.

15 Dkt. No. 430, p.4. Dorssers asserted various affirmative defenses and claims styled as a
16 "counterclaim" against Michael R. Mastro, Linda A. Mastro, and LCY-LLC Series Homes for
17 breach of the February Note, purportedly secured by the Medina Deed of Trust.

18 The Dorssers Defendants seek declaratory relief for breach of a
19 commercial promissory note by Michael R. Mastro, Linda A.
20 Mastro, and LCY, LLC – Series Home, which was secured by a
21 Deed of Trust.

22 See Dkt. No. 430, p.10.

23 As set forth more fully in the Memorandum Opinion Following Trial, the Court
24 concluded that the February Note and Medina Deed of Trust transaction was a sham not intended
25 by the Mastros or LCY, LLC – Series Home to create a binding obligation, that the transaction
26 was not consummated, that the transaction was voidable as a fraudulent transfer, and that neither
27 the estate of Michael R. Mastro nor Linda A. Mastro had any liability to Dorssers for any alleged
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⁵ See Claim No. 362, filed in the amount of \$133,000, and Claim No. 363, filed in the amount of
\$12,652,635.06, in *In re Michael R. Mastro*, 09-16841-MLB (Bankr. W.D. Wash. filed July 10,
2009). Notably, in this adversary proceeding, Dorssers abandoned his attempt to collect on the
full \$12,000,000 amount of the February Note.

1 breach of same. *See* Dkt. No. 824. The Trustee now seeks his attorneys' fees pursuant to the
2 Entry Motion.

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4 **Analysis**

5 A. The Trustee's intent to seek attorneys' fees was clear.

6 The Court concludes that Dorssers was sufficiently aware that the Trustee was seeking to
7 recover attorneys' fees against him. The Trustee's intent to seek attorneys' fees was clearly set
8 forth in the agreed Pretrial Order.

9 B. The Trustee is not entitled to attorneys' fees for prosecuting fraudulent transfer claims.

10 The Trustee is not entitled to attorneys' fees for prosecuting the state and federal
11 fraudulent transfer claims against Dorssers. In *Rothery*, the Ninth Circuit held that a fraudulent
12 transfer action pursued by a trustee in bankruptcy is not an "action on the contract" for purposes
13 of a reciprocal attorneys' fees statute. *See Rothery v. Marshack*, 200 B.R. 644, 650-51 (9th Cir.
14 B.A.P. 1996). The analysis is the same under Washington state law. *DMB Consulting Eng'rs,*
15 *Inc. v. Sanders*, 2010 Wash. App. LEXIS 2012, at *9, n.16 (Sept. 7, 2010) (unpublished) ("This
16 case is unlike *Herzog* because the claim against Sanders arises not from the contract, but from the
17 UFTA); *Worthington v. Low Cost Drugs, Inc.*, 2000 Wash. App. LEXIS 255, at *18 (Feb. 15,
18 2000) (unpublished) ("Fees are not awarded for actions based on UFTA violations.").

19 C. The Trustee is not entitled to attorneys' fees for prosecuting the claim objection.

20 The analysis regarding the Trustee's entitlement to attorneys' fees pursuant to the
21 objection to Dorssers' claim is a bit more nuanced. Had Dorssers been the prevailing party in
22 this adversary proceeding, the law of Washington is clear that the attorneys' fees provision in the
23 February Note would have applied, and Dorssers would have been entitled to attorneys' fees
24 pursuant to RCW 4.84.330. Those attorneys' fees would have been added to increase the amount
25 of Dorssers' pre-petition claim. *See SNTL Holdings Corp. v. Centre Ins. Co.*, 571 F.3d 826, 841-
26 45 (9th Cir. 2009) (holding that "attorneys' fees arising out of a prepetition contract but incurred
27 postpetition fall within the Bankruptcy Code's broad definition of claim," and concluding that
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1 such fees are to be added to the “unsecured claim under section 502”). As the prevailing party in
2 the instant adversary proceeding, the Trustee asserts that he is entitled to attorneys’ fees on behalf
3 of the bankruptcy estate pursuant to RCW 4.84.330.

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5 However, unlike Dorssers, the Trustee is *not a party* to either the February Note or the
6 Medina Deed of Trust. In Chapter 7 cases a trustee is duty bound to recover and sell a debtor’s
7 nonexempt property and to use the proceeds to pay secured, administrative, and unsecured
8 claimants. The Trustee’s objection to Dorssers’ claim under Section 502 was made as the
9 representative of Michael R. Mastro’s estate, in an effort to preserve and protect the proceeds of
10 the sale of the Medina Residence for eventual distribution to all creditors. The Trustee’s
11 standing to object to Dorssers’ claim under Section 502 as a “party in interest” does not render
12 the Trustee a party to the February Note or Medina Deed of Trust.

13 Moreover, in objecting to Dorssers’ claim, the Trustee was not asserting contractual
14 rights *as if he were* Michael R. Mastro. The Trustee’s role in pursuing claims on behalf of the
15 estate’s body of creditors is to be distinguished from the Trustee’s role in pursuing claims in the
16 Debtor’s stead. For example, in asserting a breach of contract claim, a trustee steps into the
17 shoes of the Debtor. *See Hopkins v. Saratoga Holdings, LLC*, 2008 Bankr. LEXIS 1357 (Bankr.
18 D. Idaho 2008) (awarding a defendant attorneys’ fees against a bankruptcy trustee on a breach of
19 contract claim); *Endeavour GP, LLC v. Endeavour Highrise, L.P.*, 432 B.R. 583, 646 (Bankr.
20 S.D. Tex. 2010) (awarding attorneys’ fees to a trustee as the prevailing plaintiff on a breach of
21 contract claim); *see also Akers v. Geviss*, 2006 Bankr. LEXIS 4697, at *14 (Bankr. S. D. Cal.
22 2006), *reversed on other grounds*, (noting that to seek damages for breach of a marital settlement
23 agreement, “the Trustee must step into the Debtor’s shoes in asserting this claim”); *New*
24 *Cingular Wireless Servs., Inc., v. Burkhardt*, 2008 U.S. Dist. LEXIS 79273, at *13 (E.D. Cal.
25 2008) (noting that with regard to contractual rights the “estate stands in the shoes of the debtor”).
26 However, when a trustee objects to a claim, as with creditors who object to a claim, the trustee is
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1 not standing in the shoes of the debtor and is therefore not acting as a party to the asserted
2 contract.

3 Numerous Washington cases have found that a contract's attorneys' fees provision should
4 not be applied reciprocally as to a nonsignator to the contract. *See e.g., Mut. Sec. Fin. v. Unite*,
5 68 Wn. App. 636, 643 (1993) ("[B]ecause Guzman never signed the note . . . there is no basis to
6 award Guzman attorney's fees based on a 'bilateral' application of the note's attorney fee
7 provision"); *DBM Consulting Eng'rs, Inc. v. Sanders*, 2010 Wash. App. LEXIS 2012 (Sept. 7,
8 2010) (unpublished) ("Sanders . . . was not a party to the contract and is not entitled to fees on
9 that basis."); *Watkins v. Restorative Care Ctr.*, 66 Wn. App. 178, 194-95 (1992) ("It would be
10 both unfair and contrary to law to enforce the attorney fees provision negotiated between the
11 Pavloffs and RCC against the Watkins, who were strangers to the agreement."); *Snohomish*
12 *Reg'l Drug Task Force v. Real Prop. Known as 414 Newberg Rd.*, 151 Wn. App. 743, 761 n.10
13 (2009) ("[RCW 4.84.330] has little if any applicability to contractual provisions requiring
14 indemnification of legal costs incurred as a result of actions brought by third parties.").

15 Although some Washington cases have found "that attorney fees may in some
16 circumstances be awarded under RCW 4.84.330 to a nonsignatory, the action must be one in
17 which it is alleged that a person is liable on a contract." *Niederle v. T.D. Escrow Servs.*, 2002
18 Wash. App. LEXIS 2944, at *11-12 (Nov. 25, 2002) (unpublished) (internal quotes omitted)
19 (citing *Herzog*, 39 Wn. App. At 197); *see also P.T. Ika Muda Seafoods, Int'l*, 2006 Wash. App.
20 LEXIS 2331 (Oct. 23, 2006) (unpublished). Here, the Trustee made no allegation that Dorssers
21 was liable on either the February Note or Medina Deed of Trust. Rather, the Trustee alleged they
22 were sham transactions. Thus, the Trustee is not entitled to attorneys' fees for objecting to
23 Dorssers' claim.
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1 D. Even if the Trustee were treated as a party to the purported contract, Washington law
2 further supports the conclusion that application of RCW 4.84.330 would not be
3 appropriate here.

4 In *Herzog*, deciding an issue of first impression, Division I of the Court of Appeals held
5 that pursuant to RCW 4.84.330 a “defendant who successfully defends a breach of contract
6 lawsuit by proving the absence of an enforceable contract [is] entitled to attorney fees on the
7 basis of the purported contract sued upon which would have allowed attorney fees to the
8 plaintiff.” *In re Herzog Aluminum Inc. v. General American Window Corporation*, 39 Wn. App.
9 188, 189, 197 (1984); *Mt. Hood Bev. Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121
10 (2003) (adopting *Herzog*’s reasoning). Division III of the Court of Appeals has reached the same
11 conclusion as *Herzog*. See e.g., *Meenach v. Triple “e” Meats*, 39 Wn. App 635, 640-41 (1985).
12 Division II of the Court of Appeals indicated that it did not necessarily disagree with the
13 reasoning of *Herzog*, but declined to apply *Herzog*, “where the parties seeking fees . . . did not
14 intend to form a contract.” *Wallace v. Kuehner*, 111 Wn. App. 809, 820 (2002) (emphasis
15 added).
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17 Subsequent Washington cases have universally followed the “mutuality of remedy”
18 reasoning set forth in *Herzog* and *Mt. Hood* – that attorneys’ fees should be reciprocally awarded
19 in situations in which the other party would have been entitled to attorneys’ fees had they
20 prevailed. See *Kaintz v. PLG, Inc.*, 147 Wn. App. 782 (2008) (discussing “mutuality of
21 remedy”). However, subsequent cases, including some in Division I from which *Herzog* came,
22 have also adopted the reasoning of Division II as set forth in *Kuehner* -- distinguishing “between
23 circumstances where the parties *intended* to form a contract (but failed due to some operation of
24 law), and those where the parties never intended to be bound.” *Borton & Sons v. Novazone, Inc.*,
25 2011 U.S. Dist. LEXIS 88372 (E.D. Wash. Aug. 10, 2011); see also *P.T. Ika Muda Seafoods,*
26 *Int’l v. Ocean Beauty Seafoods, Inc.*, 2006 Wash. App. LEXIS 2331 (Oct. 23, 2006)
27 (unpublished) (Division I case); *Munro v. Swanson*, 2007 Wash. App. LEXIS 310 (Feb. 20,
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1 2007) (unpublished) (Division I case). In the instant adversary proceeding, this Court
2 unequivocally found that the February Note and Medina Deed of Trust were sham transactions
3 and that neither LCY, LLC- Series Home, Michael R., nor Linda A. Mastro had any intent to be
4 bound by them. Thus, this Court finds the facts here to be most analogous to *Kuehner*, and
5 concludes as an additional basis that an award of the Trustee's attorneys' fees would be
6 inappropriate, because there was no mutual intent to form a contract.
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8 Conclusion

9 For the reasons set forth above, the Trustee's request for attorneys' fees against Dorssers
10 is denied.

11 /// End of Memorandum ///

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